are, of course, calculated as the difference between revenues and booked accounting costs. Accounting costs, however, have little, if any, relevance to the actual or economic costs of poles and conduit. Given the circumstances present in the pole and conduit market, the use of a historical embedded cost ratemaking methodology cannot result in a just and reasonable rate as required by the statute. [47/]

30. When moving to a competitive market paradigm for communications services, the Commission has recognized that it is important that regulations distort the normal functioning of the market as little as possible. [48/] Actual or economic costs reflect a resource's market value that is objective and reflects the actual cost of providing an incremental unit of a good or service. [49/] In the case of capital investment, actual or economic cost is the replacement cost which would be incurred going forward. Thus, in order to conform the pole attachment and conduit rate formulas to the competitive market paradigm, rates should be set at replacement cost rather than historic cost, otherwise resources will not be allocated to their highest valued uses.

31. Eighteen years ago, the Commission adopted an accounting interpretation of the notion of "cost" in § 224(d)(1). As such, the Commission has relied solely on historic "costs" as reported by electric utilities on their FERC Form No. 1s. From an economic efficiency view, this type of rate formula based on historic costs is deficient on two grounds. First, even if average costs are correctly captured and categorized in the

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47/ Id.

48/ See generally Speech by Chairman Hundt, Antitrust Conference for Corporate General Counsels, 1996 FCC LEXIS 5935.

49/ Id.

FERC accounts, which often they are not,[50] such a requirement imposes a "welfare" loss on society in that prices diverge from the optimal level of equivalent marginal costs.[51] Second, and more importantly, in the long run, an average cost calculation based on embedded costs is unlikely to equal the true economic equivalent of long-run average costs.[52]

32. Because the Commission's current interpretation of § 224 results in economic inefficiencies in terms of the misallocation of resources, and because the 1996 Amendments to the Pole Attachments Act anticipate the negotiation of market rates for access to poles and conduit, the Commission should revisit its interpretation of § 224 to be consistent with the deregulatory, pro-competitive underpinnings of the 1996 Act. For this reason, the Electric Utilities contend that the Commission should be relying on an economic interpretation of the cost components in § 224(d)(1) rather than the accounting components identified and relied on previously by the Commission.

B. Other Courts And Agencies Have Interpreted "Actual Cost" To Include This Economic Component

33. As courts and other agencies have long recognized, historic cost is only one permissible component of "actual cost."[53] For example, agencies that regulate rates

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50/ See discussion infra Sections VIII and IX.

51/ For a more complete discussion of the cost-of-service ratemaking where investment in plant is based on historical embedded cost, see Reed Report, Exhibit 1 at 16-19.

52/ See id.

53/ See City of Los Angeles Dep't of Airports v. United States DOT, 103 F.3d 1027, 1031-32 (D.C. Cir. 1997).

have long recognized "opportunity cost" as a factor to be considered when setting rates designed to cover the actual costs incurred to provide a particular service.[54/]

34. Similarly, in City of Los Angeles, the U.S. Court of Appeals for the D.C. Circuit rebuffed an interpretation under the Anti-Head Tax Act, 49 U.S.C. § 40116 (1997), that prohibited the city from including in its landing fee a rental charge reflecting present fair market value of land underlying an airfield and, instead, required use of historic cost. The D.C. Circuit held that nothing in the Anti-Head Tax Act prescribed an accounting rather than an economic conception of "cost" in airport ratemaking. As such, the D.C. Circuit determined that failure to consider an economic conception of "cost" without a sufficient explanation was arbitrary and capricious.

35. Similar to the FAA in City of Los Angeles, absent clear congressional intent to the contrary, the Commission here is not precluded from considering a forward-loading economic cost methodology in the pole attachment context. Indeed, in light of the Commission's recognition that to be "pro-competition" cost-based prices should be based on forward-looking cost, consistency dictates that the Commission adopt a similar "economic approach" in the pole and conduit rate formula context.

C. The Commission Has Implicitly Recognized Its Authority To Implement An Interpretation of § 224(d)(1) Other Than One Based On Historic Costs

36. The Commission's current inquiry illustrates that the language in § 224(d)(1) is susceptible to an interpretation based on something other than historical

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54/ Id. (citing Pennsylvania Elec. Co., 60 F.E.R.C. ¶ 61,034, 61,120 & n.1 (1992), aff'd sub nom., Pennsylvania Elec. v. FERC, 11 F.3d 207 (D.C. Cir. 1993)).

costs. For example, the Commission currently is considering whether pole removal costs should be eliminated from the accumulated depreciation account.[55/] Without regard to whether this approach is appropriate, the Commission's determination to consider such an approach shows its tendency to move away from the constraints of a pricing formula based solely on historic cost methodology.

37. Equally significant, the Commission has also considered employing gross instead of net costs of capital for ratemaking purposes.[56/] Again, if the Commission had no discretion and was forced to adhere strictly to an historic cost concept, such an option would not be available. The Commission's willingness to consider these changes demonstrates that it implicitly recognizes that it does have the discretion to, and should employ, an economic interpretation of the language in § 224(d)(1). The Electric Utilities agree with the Commission's implicit recognition that it has the discretion to change its approach to ratemaking under § 224, and should do so.

55/ NPRM ¶ 23.

56/ Id. ¶ 29.

IV. The Statute Allows The Commission To Implement The Forward-Looking Economic Cost Pricing Model In Determining The Appropriate Rates For Pole And Conduit Access

A. The Statutory Framework

1. In Contrast To 1978, In 1996 Congress Was Concerned About Creating A Level Playing Field Between Telecommunications Carriers And Cable Companies Providing Telecommunications Services, Not Subsidizing A Fledgling Cable Industry

38. The legislative changes to the Pole Attachments Act that eventually became § 703 of the 1996 Act were developed against a background of expansion of the cable industry into the provision of telecommunications services.[57] Congress was concerned with putting telecommunications carriers needing wireline attachments and cable operators providing telecommunications service on an equal footing. For example, the Conference Report on the final version of the 1996 Act notes that the House amendment "is intended to remedy the inequity of charges for pole attachments among providers of telecommunications services."[58] Congress, therefore, extended cable pole attachment rights to telecommunications carriers to create a level playing field for attachments for wireline telecommunications services.

39. The Commission has proposed to continue to interpret § 224(d)(1) to mean that a utility can charge a cable system or telecommunications carrier no more than the proportion of operating expenses and historical capital costs that a utility incurs in owning and maintaining poles associated with the space occupied by pole

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57/ H.R. Rep. No. 104-204, at 91 (1995), reprinted in, 1996 U.S.C.C.A.N.10, 58.

58/ H.R. Conf. Rep. No. 104-458, at 206 (1996).

attachments. [59] This "accounting" interpretation may have been appropriate in 1978 when Congress was concerned with the cable companies' inferior bargaining position vis-a-vis utilities and wanted to assist an industry in its infancy. However, the Commission must recognize that these market imbalances and infant industry no longer exist.[60] As such, the "accounting interpretation" that the Commission applied to remedy perceived problems is no longer appropriate and will not result in a just and reasonable rate when considered in light of the current market dynamics for access to utility poles and conduits.

40. Equally important, the approach taken in 1978 is now contrary to the 1996 Act Amendments to the Pole Attachments Act as well as the pro-competitive goals and policies of the 1996 Act. The 104th Congress intended to create a level playing field for competitors needing attachments for wireline facilities. It was not Congress's intention to broadly subsidize new entry into the telecommunications industry, or to create unnecessary distortions in the market. The Electric Utilities believe that the best approach for ensuring a level playing field for access to utility infrastructure is a costing methodology that closely approximates the market negotiations that are required post-2001. This can best be achieved by implementing a Forward-Looking Economic Cost Pricing Model which considers the economic value of capital.

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[59] NPRM ¶ 2.

[60] See discussion supra Section II.

2. Congress Amended § 224 In A Manner Consistent With The Pro-Competitive, De-Regulatory Objectives Of The 1996 Act

41. As discussed above, in 1996, Congress intended to create a level playing field among participants in the wireline telecommunications marketplace. Although Congress did not change the language of § 224(d)(1), Congress did fundamentally alter the pole attachment provisions of the statute. Accordingly, the Commission should interpret the rate provisions of § 224(d)(1) in a manner that is consistent with the overall amendments to § 224. The Electric Utilities believe that this can be achieved only by using a costing approach that brings the regulated rate more in line with a market rate.

a. Post-2001: Telecommunications Carriers And Cable Operators Providing Telecommunications Services Must Negotiate A Market Rate For Access To Poles And Conduit

42. Consistent with the overall goals of the 1996 Act, the amendments to the Pole Attachments Act reflect Congress's commitment to allow the free market to work in the context of pole and conduit access. As part of the 1996 Act, Congress amended the Pole Attachments Act to extend the rights afforded to cable providers to other wireline telecommunications carriers.[61/] In addition, Congress set forth a new cost allocation methodology to govern the pole attachment rates that utilities charge telecommunications carriers after the year 2001.[62/]

43. Significantly, Congress determined that the new subsection (e) language would only apply "when the parties fail to resolve a dispute over such charges."[63/] As

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61/ See 47 U.S.C. § 224(a)(4).

62/ See 47 U.S.C. § 224(e).

63/ 47 U.S.C. § 224(e).

the legislative history clearly states, Congress specifically amended § 224 "to allow parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities."[64] As such, meaningful negotiation can occur only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation.[65]

44. Thus, § 224(e)(1) anticipates that the parties to a pole attachment agreement would negotiate a market rate first without government intervention.

b. Pre-2001, Telecommunications Carriers With Existing Contracts Must Continue To Pay A Market-Based Rate For Access To Poles And Conduit

45. Consistent with the free market approach discussed above, in § 224(d)(3) Congress specifically determined to "grandfather" agreements negotiated at market rates between utilities and telecommunications carriers prior to enactment of the 1996 Act. In § 224(d)(3), the 1996 Act Amendments provide that the language in § 224(d)(1) shall apply to telecommunications carriers until the effective date of the regulations required under subsection (e).[66] However, Congress specifically excluded telecommunications carriers with existing pole attachments from the import of this provision. As such, telecommunications carriers with existing pole attachment agreements on February 8, 1996 will continue to pay the market-rate that they negotiated for access to utility poles

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[64] H.R. Conf. Rep. No. 104-458, at 113 (1996) (emphasis added).

[65] Reed Report, Exhibit 1 at 23-24.

[66] 47 U.S.C. § 224 (d)(3).

and conduit. After 2001, the default regulatory formula under § 224(e) will come into play only when the parties fail to negotiate a new rate.

c. ILECs Must Pay A Market Rate Both Pre- and Post-2001

46. The treatment of ILECs is another example of Congress's confidence in the ability of free market negotiations to produce a just and reasonable rate for pole access. Although the 1996 Act expanded the scope of § 224 to include telecommunications carriers, Congress determined to specifically exempt ILECs [67] and, as such, ILECs must continue to pay a market-based price for access to electric utilities' poles and conduit. Significantly, even though they are required to pay market rates, ILECs are still opting to divest their pole ownership and the costs associated with such ownership, deciding instead to attach to electric utility poles at market negotiated rates. [68]

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[67] Section 224(a)(5) provides that "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h)." 47 U.S.C. § 224(a)(5).

[68] For example, in Florida, the independently-owned electric utilities own and install the vast majority of all joint-use poles. Florida Power and Light Company ("FPL") has three major ILECs in its service territory. FPL owns 97% of the poles for two of the three ILECs in its service territory and is in discussion with the 3rd ILEC that wishes to sell all of its joint-use poles.

B. The Legislative History Of The Pole Attachment Provisions From 1978 Makes Clear That The Commission Is Free To Give § 224(d)(1) The Contemporary Interpretation Advanced In These Comments

1. In 1978, Congress Perceived A Need For A High Level Of Governmental Intervention To Assist An Unestablished New Entrant Into The Communications Marketplace

47. When the 95th Congress passed the Pole Attachments Act in 1978, the market for pole access looked very different than the market for pole access in 1996. In 1978, cable companies were small, unestablished new entrants with a perceived need for government intervention to facilitate access to poles largely because of perceived anti-competitive practices by Bell System companies that controlled the communications space on most poles.[69/]

48. Because Bell System companies largely controlled the communications space, and because Congress believed that these companies had an economic incentive to block access to poles, Congress perceived a need for a high level of government intervention.[70/] However, in 1996, Congress moved distinctly away from this model.

69/ See discussion of the evolution of the cable industry, Reed Report, Exhibit 1 at 3-4.

70/ For example, the legislative history reveals that "[t]he committee received testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future." S. Conf. Rep. No. 95-580, at 13 (1977), reprinted in 1978 U.S.C.C.A.N.109, 121. Nonetheless, Congress intended that the Commission limit its level of regulation to the minimum amount necessary to effectuate the goals of the legislation. The Pole Attachments Act was a stop-gap measure. In 1978, Congress intended the formula set forth in § 224(d)(1) to be an interim formula only. Id. at 16, 21. After the initial five-year period, Congress expected the Commission to be guided by the phrase "just and reasonable." Id. Thus, even when Congress passed the original Pole

2. Congress Intended That The Commission Use Its Experience To Interpret The Language In § 224(d)(1)

49. In 1978, the Pole Attachments Act did not specify the precise method for calculating "operating expenses" and "actual capital costs." Rather, the legislative history suggests that Congress intended to give the Commission discretion to decide when the use of historical cost data would be appropriate. [71] "Not wishing to foreclose the Commission from accepting any particular costing methodology, the committee merely seeks to permit the Commission to consider each case on its own merits and according to its own facts."[72] Nothing in the 1996 Act circumscribes this discretion. Accordingly, the Commission has the authority to interpret the statutory language in § 224(d)(1) to include forward-looking economic costs.[73]

Attachments Act, it intended to provide the Commission with the flexibility to adopt a rate formula that properly balanced the conditions affecting the relevant market for access.

71/ Monongahela Power Co. v. FCC, 655 F.2d 1254, 1256 (D.C. Cir. 1981).

72/ 124 Cong. Rec. S1598 (daily ed. Jan. 31, 1978) (remarks of Sen. Hollings).

73/ In 1982, Congress amended the Pole Attachments Act to remove the sunset provision and thereby retain the statutory language set forth in subsection (d). Congress determined not to revoke the language reasoning that "it would increase the likelihood that parties would petition to alter the formula by rulemaking, with resulting increased burden on the FCC and uncertainty in the industry until such issues were resolved." H.R. Conf. Rep. No. 97-765, at 31 (1982), reprinted in 1982 U.S.C.C.A.N.2237, 2275. Presently, because the Commission has determined to change the formula by rulemaking, congressional concern over an increased burden on the Commission from any attempt to change the formula is invalidated. Equally important, however, when Congress amended the Pole Attachments Act to retain the statutory formula in subsection (d), it did not take away from the Commission the discretion to interpret the language in a manner consistent with prevalent market conditions relating to access.

V. The Consequences Of Not Employing A Forward-Looking Capital Cost Model For Poles and Conduit Will Lead To Economic Inefficiency

50. The consequences of proceeding with the agency's historical approach and not employing a forward-looking cost of capital as a means of calculating rates for pole attachments and conduit access can really be thought of as the flip side of doing so. That is, by not employing this proper concept of capital, the subsequent rate structure will: (1) not emulate competitive market prices; (2) not efficiently allocate pole and conduit capacity; (3) not serve as a relevant barometer to trigger efficient entry and exit in the market; and (4) inappropriately subsidize or burden one party.

51. Chairman Reed Hundt stated recently that there are certain key elements of a pro-competitive approach:

> (1) Do not favor any particular mode of competitive entry ...but allow entrants to select the methods of entry that best fit their business plans;
>
> (2) Entrants must not be charged more than economic cost, and incumbents must be allowed to charge economic cost, for leasing parts of the incumbent network....[74/]

There is no rational reason for the Commission to selectively abandon these principles in the pole and conduit access context.

A. Historic Costs Have No Relationship To Competitive Market Prices

52. As they relate to users of the poles and conduits, who are not the utility's core customers, a utility's historical costs for poles and conduit have no relevance to current or prospective market conditions. These costs do not reflect the cost structure faced by a competitive entrant or a utility seeking to expand the capacity of these

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[74/] Speech by Chairman Hundt, 1996 FCC LEXIS 5935, at *5.

facilities. If used to establish a rate, the historical costs of a utility will not promote allocative or productive efficiency. As discussed in detail in the attached Reed Report, [75] allocative efficiency is achieved through competitive prices in that goods and services are allocated to those who value them the highest. If a pole or conduit rate is based on historical costs that are significantly below replacement costs, the rate will fall far short of the competitive market equivalent price. As a result, the good or service is not allocated to those who value it the highest, but rather to the first entity in line for the favorable rate. Similarly, a rate based on historical costs so far out of line with replacement costs will also stymie productive efficiency.

B. The Commission's Historic Cost Methodology Will Lead To A Misallocation Of Pole And Conduit Capacity

53. If resource prices do not equate to competitive levels, the resource will either be under-utilized or over-utilized. In the case where prices are set above competitive levels, the resource will be under-utilized. The value of the resource will be relatively more expensive than alternatives, thus leading consumers to direct their purchases to the lower-priced alternative. In the long run, a vast oversupply of the resource will develop as demand for the resource drops. Conversely, if prices are set below competitive levels, consumers will be motivated to employ the resource at the expense of alternatives that are more economically efficient. In the long run, the resource will be over-utilized and in excess demand as owners of the resource decrease investment.

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[75] See Reed Report, Exhibit 1 at 26-28.

54. In the case of poles and conduits, the consequences are clear. If prices are below competitive levels, attachers will find poles and conduits the more attractive alternative. Pole and conduit capacity will be over-utilized relative to alternatives. The over-utilization has both short and long-run consequences. In the short run, the use of pole and conduit capacity will be distorted in that it will not be allocated to its highest-valued use. In the long run, this distortion will remain. However, in addition, the investment in alternatives, such as wireless capacity, will be thwarted. In pricing pole and conduit capacity below competitive levels, excess demand will be created, and with it, excess supply in the alternatives to poles and conduits. As a result, investment in alternatives will be diminished, thus long-term growth will be hindered. Absent competitive market pricing, the industry will not develop efficiently.

55. The importance of the development in alternatives to poles and conduits is two-fold. First, for a long-term viable market to develop, sufficient alternatives must exist. Lacking sufficient alternatives, the Commission will find itself regulating rates for poles and conduits in perpetuity. As the number and quality of alternatives to poles and conduits decline due to hindered investment, the appropriateness of employing market-based pricing will fall. At the same time, the utilities will have no incentive to expand capacity on poles or conduits, thus leading to a long-term decline in these resources. Ultimately, the growth of the cable and wireline telecommunications industries will be thwarted by both developments.

56. The availability and growth of alternatives are also beneficial due to the general societal aversion to poles. The cost of a pole to society is not simply the

investment costs. In addition to these costs, poles impose an external cost in the form of aesthetic concerns. Cost issues aside, if faced with a decision to expand conduits or poles, most communities would choose the former. If priced below market value, the demand for pole capacity will increase and with it the need to expand when necessary. This, in turn, tends to exacerbate the societal issues associated with aesthetic concerns.

C. An Historic Cost Methodology Provides An Inadequate Barometer For Entry And Exit In The Telecommunications and Cable Markets

57. In addition to acting as signals for efficient resource allocation, competitive prices also serve as signals on which firms base their decisions to enter and exit a market. The issue of the signalling value for entry and exit applies to entry by cable and telecommunications carriers, as well as entry by firms offering alternatives to utility poles and conduits. In deciding to enter a market, a cable or telecommunications company seeking access to utility poles or conduit capacity will factor in the projected revenues and costs associated with serving a particular market. If prices for pole or conduit capacity are below competitive levels, the costs associated with entering the market will necessarily be understated and, as such, make entry more attractive. If priced competitively, the cable or telecommunications company might have chosen a more efficient alternative to the pole or conduit. In addition, as the demand for alternatives declines, the incentive of other firms to provide alternatives will decline as well and will be manifested as a decrease in market entry for the firm producing the alternative.

D. Subsidies And Burdens Are Generated From Inappropriate Pricing

58. The preceding discussion focused primarily on the negative economic efficiency consequences that result when pole and conduit capacity is not priced at

competitive levels. In addition to these consequences, it must be recognized that rates not based on forward-looking economic costs will necessarily subsidize one party at the expense of the other. [76] In the present case, if prices are below competitive levels, the customers of electric utilities are providing a direct subsidy to the cable and telecommunications companies. [77]

59. When prices for regulated goods and services are not equal to competitive market prices, an economic rent is created. Loosely defined, economic rent is the difference between the market value of a good and the cost incurred by the owner in bringing it to market. In the present case, the economic rent is the difference between the market value of pole and conduit capacity and the established embedded cost-based rate. In competitive markets, the owners of the resource generally receive any economic rent.

60. If rates for pole and conduit capacity are set far below competitive market levels, a sizable rent will be created and will not be enjoyed by the utility or its ratepayers. In short, the customers of the utilities will subsidize the cable and telecommunications companies in an amount equivalent to the economic rent associated with the assets. The customers and the electric utilities paid for these assets. They, not the cable and telecommunications companies, should enjoy the economic rent associated with the poles and conduits. Given the change in the environment for pole and conduit

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[76] See Reed Report, Exhibit 1 at 50-51.

[77] See id.

access, such a subsidy is untenable. As discussed throughout these Comments, cable and telecommunications companies seeking access are large, sophisticated market participants, such as AT&T and TCI. Therefore, regulations that subsidize these companies are misplaced.

VI. In Implementing A Rate Formula, The Commission Must Recognize That Electric Utility Poles And Conduit Are Not "Essential Facilities" For The Cable And Telecommunications Industries

61. The Commission has initiated this rulemaking under § 224 of the Communications Act. The Electric Utilities agree that the statutory framework of § 224 and the current policies of the 1996 Act (and the Commission's implementation of this Act) should govern this rulemaking. In the past, however, the Commission has used the "essential facilities" doctrine to justify heavy-handed regulation of electric utility pole attachment access and rates.[78/] This justification is improper because the "core business" of electric utilities competes with neither the cable television nor the telecommunications industries. The primary line of business of electric utilities, and thus the relevant market for applying the essential facilities doctrine, is the provision of electric power to consumers, not the provision of telephone or cable television services to consumers. Therefore, the Electric Utilities are compelled to refute the notion that

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78/ Common Carrier Bureau Cautions Owners of Utility Poles, Public Notice, 1995 FCC LEXIS 193, Release No. DA 95-35 (Jan. 11, 1995).

electric utility pole and conduit should be treated as "essential facilities" for purposes of establishing the appropriate rate formulas for access to these facilities.[79/]

A. The Essential Facilities Doctrine Applies In Very Limited Circumstances

62. The essential facilities doctrine applies only in limited circumstances where a monopolist refuses to supply to a competitor a "facility" that is essential if there is to be competition in the relevant market and which cannot feasibly be replicated by the competitor. The law provides under these circumstances that the facility must be provided to competitors. For instance, in MCI Communications Corp. v. AT&T,[80/] the Seventh Circuit determined that AT&T's nationwide telephone network was an essential facility and that MCI, as a competitor of AT&T for long-distance telephone service, must have access to AT&T's network in order for there to be competition for long-distance telephone service.

63. Courts have consistently rejected essential facilities claims where the company alleged to have an essential facility was not in the same relevant market as the company seeking access to the facility. For example, the First Circuit Court of Appeals rejected the claim of a charter airline that an airport terminal was an essential facility because the airline was not in competition with the airport operator. The court held that because the two companies were not competing in the same market, the essential facilities doctrine could not apply.[81/] Likewise, the Ninth Circuit held the essential

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79/ See also Reed Report, Exhibit 1 at 37.

80/ 708 F.2d 1081, 1132 (7th Cir. 1983).

81/ Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9 (1st Cir. 1987).

facilities doctrine inapplicable to a convention center where the owner was not in competition with the trade show operator who sought access.[82] Thus, because the Electric Utilities' primary line of business does not compete with telecommunications and cable companies, the Commission can not justify over-regulation of electric pole and conduit attachment rates under the essential facilities doctrine.

B. The Essential Facilities Doctrine Does Not Apply Because There Are Other Means By Which Telecommunications Services And Cable Services Are Carried

64. Even if the Electric Utilities were considered to be in the same relevant market as the cable and telecommunications providers, the essential facilities doctrine cannot justify a high level of intervention by the Commission, as there are other means by which cable and telecommunications services are provided.

65. No viable alternative must exist before the essential facilities doctrine can be applied.[83] For example, the essential facilities doctrine was held inapplicable where a doctor performed the same surgical procedures in his office as in the hospital

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[82] Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988). See also Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 926 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981) (essential facilities doctrine not applicable where publisher of airline schedules and airlines themselves were "engaged in a different line of commerce."); Eureka Urethane, Inc. v. PBA, Inc., 746 F. Supp. 915 (E.D. Mo. 1990), aff'd, 935 F.2d 990 (8th Cir. 1991) (professional bowler's association and bowling ball manufacturer not in same relevant market, therefore, essential facilities doctrine inapplicable); Helen Brett Enters. v. New Orleans Metro. Convention & Visitor's Bureau, 1996-2 Trade Cas. (CCH) ¶ 71,529, at 77,802 (E.D. La. 1996) (essential facilities doctrine inapplicable where manager of convention center and promoter of trade shows not in competition).

[83] Rural Tel. Serv. Co. v. Feist Publications, Inc., 737 F. Supp. 610 (D. Kan. 1990).

emergency room that he claimed was an "essential facility."[84] In another case, fuel storage bunkers at a port were not essential facilities because other storage alternatives were available.[85]

66. Many viable alternatives to utility poles and conduits are being developed or are now available to cable and telecommunications providers to deliver their services. Cable and telecommunications companies themselves have their own conduit systems and rights-of-way. In addition, telecommunications and cable companies are aggressively adding transmission capacity to their systems throughout the country. In many cases, much of the additional capacity may go unused and be available for lease to competitors and others. For instance, in St. Louis, MCI Communications Corp., MFS Communications and Southwestern Bell Telephone are all installing new fiber optic cables and new conduit with space capacity for future needs.[86] In Maryland, Comcast

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[84] McKenzie v. Mercy Hosp. of Independence, 854 F.2d 365, 367 (10th Cir. 1988).

[85] Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528 (S.D. Fla. 1989); Flip Side Prods. v. Jam Prods., 843 F.2d 1024 (7th Cir.), cert. denied, 488 U.S. 909 (1988) (rock concert arena not an essential facility where other venues were available); Continental Trend Resources v. Oxy USA, 1991 U.S. Dist. LEXIS 15,203, 1991-2 Trade Cas. (CCH) ¶ 69,510 (W.D. Okla. 1991) (doctrine inapplicable to a natural gas pipeline where alternative transmission systems were available, including four constructed by plaintiffs). Additionally, it is insufficient for the party seeking access to a facility to merely allege that the facility is "more economical" than other alternatives. Florida Cities v. Florida Power & Light Co., 525 F. Supp. 1000, 1007 (S.D. Fla. 1981). Mere "inconvenience, or even some economic loss" is insufficient to invoke the doctrine; rather the plaintiff must be able to "show that an alternative to the facility is not feasible." Twin Lab. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

[86] Phil Sutin, In the Fast Lane: New Highway 5 Feet Underground Will Carry Data, Not Vehicles, St. Louis Post-Dispatch, Mar. 30, 1995, at 1.

Corp., MCI, MFS and Baltimore Gas & Electric Co. are all laying thousands of miles of coaxial and fiber optic cable with much of the conduit being laid along rights-of-way shared by other entities, and excess capacity will be leased out to other companies. [87] MFS Network Technologies announced that it will build a fiber optic communication system along the right-of-way operated by the New York State Thruway Authority. The system will be leased to cable television and telecommunications providers. [88]

67. MCI Communications and others are building local telephone networks to compete directly with the Regional Bell Operating Companies. MCI has rights-of-way acquired from Western Union and conduit to provide local service in 200 cities across the country. [89] The Pennsylvania Turnpike Commission plans to lease to telecommunications providers and cable companies 500 miles of fiber optic lines it is installing in conduits along the turnpike. [90] In Ohio, Ameritech is negotiating with the city of Upper Arlington (near Columbus) to build a new fiber optic network along public rights-of-way. [91] The Bay Area Rapid Transit ("BART") in San Francisco plans to

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[87] Michael Dresser, Underground Boom is Hitting Maryland, Baltimore Sun, June 4, 1995, at 1E.

[88] Auto Parts, Inside ITS, Oct. 23, 1995. In Florida, fifteen of the largest cable companies have collectively replaced over 15,000 miles of coaxial cable with fiber optic cable.

[89] Tom Steinert-Threlkeld, MCI Plans Local Phone Networks, Dallas Morning News, Jan. 5, 1994, at 1A.

[90] Peter J. Shelly, Turnpike's High-Tech Network Short-Circuited, Pittsburgh Post-Gazette, Sep. 22, 1996, at A1.

[91] Matthew Marx, Upper Arlington Negotiates with Ameritech for New Cable Franchise, June 25, 1995, at 5D.

install conduit for fiber optic cable along its tracks and lease it to providers.[92] Even at the lowest distribution level, the local loop, there are alternatives to utility pole attachments. Some telecommunications providers, anticipating a lucrative market for high-bandwidth consumer products, are currently implementing additional means for delivering services directly to individual homes. In San Diego County, for instance, Pacific Bell, MCI, AT&T and others plan to re-wire the entire city, including burying new coaxial underground connections into individual homes. Indeed, some are concerned that there is so much new wiring that there will be a large supply of excess capacity available.[93] It is even possible for cable providers to compete without access to any landline facility. Liberty Cable is competing with Time Warner New York City Cable Group and Cablevision in Manhattan by avoiding conduit access altogether. The company uses a wireless microwave system to offer reduced-rate cable programming to apartment complexes.[94]

68. In addition, conduit space is available from water utilities, long distance carriers, competitive access providers, railroads, highway authorities, transit authorities, sewage system operators and others. In Chicago, abandoned freight tunnels beneath Chicago's downtown have been converted for use as conduit for fiber optic and other

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92/ Harre W. Demoro, BART Wants to Help With Data Highway, San Francisco Chronicle, Mar. 5, 1993, at B7.

93/ James W. Crawley, The Dream is a Wonderland of Information and Entertainment. But for Now, San Diego's Ambitious Rewiring is ...In the Trenches, San Diego Union-Tribune, May 29, 1994, at I-1.

94/ Jay Romano, Your Home: Saving Money on Cable TV, N.Y. Times, Feb. 19, 1995, at sec. 9, pg. 5, col. 1.

cable.[95] New technology is becoming available that allows easier installation of innerducts within existing conduits, resulting in more usable space in existing facilities owned by cable and telecommunications providers. In New York, Time Warner Cable is installing special fiber optic cable designed for installation in small duct spaces in Time Warner's existing underground conduits.[96] Thus, the alternatives to electric utility poles and conduit are limitless.

C. Even If There Are Situations In Which There Are No Substitutes For The Electric Utility Poles And Conduit, Heavy-Handed Regulation Of Rates Under The Essential Facilities Doctrine Is Not Justified Because Market And Regulatory Constraints Exist On The Amount Utilities Can Charge For Access To Poles

69. The essential facilities doctrine applies only when a monopolist refuses to deal with a competitor.[97] Here, the FCC has determined that the Electric Utilities, by law, must provide access to their poles and conduit once they provide access to any cable or telecommunications provider.[98] Because there can be no refusal to deal,[99] the essential facilities doctrine is not a rational basis for overly burdensome regulation.

95/ Patrick Reardon, Buried Treasure, Chicago Tribune, Dec. 11, 1992, at N1.

96/ Glen Dickson, Lucent Technologies and ANTEC: Contract for Specially Designed Cable for Time Warner Cable, Broadcasting & Cable, June 24, 1996, at 66.

97/ County of Stanislaus v. Pacific Gas & Elec. Co., 1996-1 Trade Cas. (CCH) ¶ 71,305, at 76,443 (E.D. Cal. 1995).

98/ Local Competition Order ¶ 1173.

99/ Under § 224(f)(2), an electric utility may refuse to allow access if it determines that there is insufficient capacity, or a preclusive safety, reliability or engineering concern. See 47 U.S.C. § 224(f)(2).

70. Market constraints limit the amount the Electric Utilities can charge for access to their poles and conduit. Past history indicates that the free market has worked to establish fair rates. Since 1978, there has been a history of electric utilities negotiating fair market price agreements with the telecommunications industry. For example, the Louisville Gas & Electric Co. ("LG&E") signed an agreement allowing TKR Cable of Greater Louisville to install $156 million in fiber optic cable in LG&E conduits. LG&E wanted the deal because it will allow them to lower overall costs by way of remote meter reading. [100/]

71. In addition, market constraints exist that provide the utilities with the strong economic incentive to charge competitive rates. First, to the extent that there is available capacity on poles and in conduit, the utilities are encouraged to deal with the cable and telecommunications companies. For example, the Municipal Electric Authority of Georgia will invest $40 million in building a fiber optic network and plans to lease conduit space or excess capacity on the fiber to cable and telecommunications providers at a market rate, thus demonstrating that the cable and telecommunication companies have a choice between leasing excess capacity or running their own new facilities. [101/] In addition, the market creates an upper limit to what utilities can charge for pole and conduit rates as higher rates would provide incentives for the cable and telecommunications companies to switch to alternative means of distribution.

[100/] Cynthia Wilson, Detection of Outages are Gains, Courier-Journal, Oct. 29, 1995, at 1D.

[101/] Marlon Manuel, The Fiber of Growth, Atlanta Journal, May 30, 1996, at 2B.

72. Finally, regulation also limits the rates utilities can charge. Section 224(g) prohibits price discrimination by the utilities in the rates they may charge telecommunications and cable providers for access to poles and conduit, if the utility is also competing with such providers by offering such telecommunication or cable services either directly or through subsidiaries or affiliates. 47 U.S.C. § 224(g). As such, there is already sufficient regulatory protection from any anticompetitive practices by the electric utilities.

VII. The Proposed Pole and Conduit Formulas Should Reflect Forward-Looking Economic Costs

73. Although the pole attachment rate formula has been revised in minimal respects over the intervening years,[102] the telecommunications, cable television and electric industries have changed so dramatically that assumptions underlying the pole attachment rate formula are no longer correct. This results in an inaccurate calculation of a just and reasonable pole attachment rate.[103] In addition, in the 1996 Act, Congress fundamentally altered the Pole Attachments Act.[104] Accordingly, the Electric Utilities believe that the Commission should conform its approach to pole and

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102/ See, e.g., In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order, 72 FCC 2d 59 (1979); Petition to Adopt Rules Concerning Usable Space on Utility Poles, Memorandum Opinion and Order, RM 4556, FCC 84-325 (released July 25, 1984); In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 FCC Rcd 4387 (1987), recon., 4 FCC Rcd 468 (1989).

103/ See discussion supra Section II.

104/ See discussion supra Section IV.